(17)

No. 92-2058

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HAWAIIAN AIRLINES, INC.,
Petitioner,

v.

GRANT T. NORRIS,
Respondent,

and

PAUL J. FINAZZO, HOWARD E. OGDEN and HATSUO HONMA,
Petitioners,

v.

GRANT T. NORRIS,
Respondent.

On Writ of Certiorari to the Supreme Court for the State of Hawaii

---

REPLY BRIEF OF PETITIONERS

KENNETH B. HIPP *
DAVID J. DEZZANI
MARGARET C. JENKINS
LISA VON DER MEHDEN
GOODSILL ANDERSON QUINN & STIFEL
1099 Alakea Street
1800 Alii Place
Honolulu, Hawaii 96813
(808) 547-5600
Counsel for Petitioners
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

REPLY BRIEF OF PETITIONERS

In our opening brief, we showed that respondent's state-law wrongful discharge claims are preempted by the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, because (a) the RLA preempts state law as to "minor disputes" subject to mandatory arbitration; and (b) a wrongful discharge claim such as the one in this case is a classic RLA minor dispute. As to the first point, respondent argues that Congress did not intend for the RLA to effect a broad preemption of state law, but as we show in Part I below, the kind of preemption of state law that would result from requiring that minor disputes be brought pursuant to RLA arbitration procedures is precisely what Congress intended. As to the second point, respondent argues that his grievance is not a "minor dispute" because it is not based on a collective agreement, but as demonstrated in our opening brief (at 9-30) and in Part II below, the plain language of the RLA, its legislative history, and its interpretation by this Court make clear that retaliatory discharge claims are arbitrable grievances that fall squarely within the minor dispute provisions of the Act, whether or not they can be framed in a "non-contractual" way.

We also argued in our opening brief (at 43-45) that respondent's claims would be preempted by the RLA even if the category of minor disputes were limited to those involving interpretation or application of a collective agreement. As we show in Part III below, respondent's opposing argument, based on a narrow reading of *Lingle v. Norge Division of Magic Chef, Inc.* (*"Lingle"*), 486 U.S. 399 (1988), is flatly contrary to this Court's decision in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n* (*"Conrail"*), 491 U.S. 299 (1989), which held that a contractual defense may give rise to a minor dispute. Were respondent's reading of *Lingle* applied in the RLA context, courts would frequently be called upon to interpret and apply railroad and airline collective agreements in derogation of the RLA.

I. MINOR DISPUTES MUST BE RESOLVED THROUGH RLA ARBITRATION

Respondent's first argument is that the RLA does not generally displace state minimum substantive protections for employees. Respondent's argument fails to raise any real issue because we have not argued that state minimum substantive protections are set aside by the RLA. Rather, our position is that state laws are preempted only to the extent that they interfere with the RLA by attempting to remove minor disputes from the mandatory arbitration framework to which Congress assigned them. *E.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977) ("Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict.")[1]

The general proposition that state laws may not remove minor disputes from RLA arbitration ought not be controversial. Indeed, in *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 322 (1972), this Court emphatically stated that "the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good

[1] Indeed, the issue raised in this case—"[w]hether the Hawaii Supreme Court erred in concluding that respondent's state law wrongful discharge claims were not preempted by the Railway Labor Act, 45 U.S.C. § 151 *et seq.*," *Hawaiian Airlines, Inc. v. Norris*, No. 92-2058 (January 21, 1994)—is even more limited than that. As we argue below in Part II, state law wrongful discharge claims, and specifically "whistleblower" retaliatory discharge claims of the type asserted by respondent, are at the heart of the minor dispute category and therefore constitute the clearest example of claims preempted by the RLA. *See infra* pp. 6-17. Thus, this case does not present an occasion for deciding what other kinds of state claims involving other kinds of issues, such as "peripheral concerns" to the RLA or "deeply rooted" local concerns, might be preempted by the RLA in the event of an asserted conflict with the RLA statutory scheme. *Cf. Sears, Roebuck & Co. v. Carpenters Dist. Council (San Diego)*, 436 U.S. 180 (1978) (state trespass action upheld despite arguably protected/prohibited conduct within NLRA preemption test).

history and is no longer good law." In these circumstances, state laws that would permit minor disputes to be brought outside the RLA grievance processes are preempted because they "'would frustrate the federal scheme'" assigning such claims to mandatory arbitration. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).[2] In essence, the RLA prohibits states from taking employment disputes involving discipline and discharge out of the RLA arbitral forum and enlisting RLA employees as "private attorneys general" to prosecute violations of state employment standards through civil suits. (*See* States Br. 11). Thus, while states may enact minimum labor standards covering RLA employers to the extent permitted by federal statutes and the Constitution, and may even enforce such laws against carriers through regulatory processes, the RLA prohibits states from creating private causes of action for individual employees to enforce those laws.

The two RLA cases[3] on which respondent relies (at 10-15) are wholly consistent with this approach; those cases addressed state minimum labor standards that were enforced by the state, rather than by private claims for relief brought by railway employees against their employers. *See Missouri Pac. R.R. v. Norwood*, 283 U.S. 249, 250 n.1 (1931) (addressing Arkansas statute that regulated freight train crews and provided for fines against noncomplying carriers, but did not provide for a private right of action by employees). In *Terminal Railroad As-*

[2] Both the Hawaii Supreme Court and the Solicitor General have recognized that "mandatory [RLA] arbitration is the exclusive remedy for claims arising from minor disputes." Pet. App. 12a; *see* Sol. Gen. Br. 8-10.

[3] Respondent also cites *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), but that case did not concern the RLA. Moreover, *Metropolitan Life* involved a state remedial provision enforced by the state attorney general, and did not provide a means by which individual employees could avoid adjustment procedures for disputes between them and their employers.

sociation of St. Louis v. Brotherhood of Railroad Trainmen, 318 U.S. 1, 7 (1943), this Court upheld a regulatory order of the Illinois Commerce Commission on the grounds that the federal interest embodied in the RLA was concerned with "disagreements over working conditions" but would not be implicated by a state regulation dictating "working conditions themselves." 318 U.S. at 7.[4]

Respondent also relies on *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987), which involved the entirely different question of whether Congress, in passing the RLA dispute resolution provisions, impliedly repealed the preexisting *federal* statutory cause of action for personal injuries to railroad workers under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.* The standards for reconciling two federal statutes are designed to effectuate both statutes where possible, and are quite different from those involving preemption of state law by a single federal enactment.[5] Therefore, the Court's decision in *Buell* finding that the RLA did not impliedly repeal employee FELA remedies does not stand for the proposition that states may enact laws that permit employees to circumvent RLA minor

[4] Respondent implies (at 12-14) that *Terminal* allowed employees to sue independently to enforce the Illinois Commerce Commission ruling in state court. However, there is nothing to suggest that employees could sue under the Illinois regulatory scheme. Even if *Terminal* did not itself preclude state court actions by individual employees, the case was decided in the wake of *Moore v. Illinois Central Railroad*, 312 U.S. 630 (1941), and so the Court could reasonably have assumed concurrent state court jurisdiction over minor dispute claims.

[5] *Compare, e.g., Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992) (preemption analysis is rooted in the Supremacy Clause, such that "state law that conflicts with federal law is 'without effect'") (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)), *with Morton v. Mancani*, 417 U.S. 535, 551 (1974) ("courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent clearly expressed congressional intention to the contrary, to regard each as effective").

dispute resolution procedures.[6] Indeed, as discussed *infra* at p. 16, *Buell*, read in context, clearly supports our position concerning the scope of minor disputes.

Preemption of state-law claims raising minor disputes would not, in fact, undermine the states' legitimate interests in regulating public safety or workplace conditions; nor would it threaten individual rights and interests. Provided that such state laws are consistent with other federal laws and the Constitution, they would remain enforceable against employers through regulatory channels, form the floor for negotiation of conditions under the bargaining agreement,[7] and have to be taken into account in the RLA adjustment board process.[8] Individual employees covered under the RLA have the right to pursue their own claims before adjustment boards, 45 U.S.C. § 153 First (i) and (j), and this Court has recog-

[6] The Solicitor General (Br. 11, 14, 24-25) also includes *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), as a case recognizing states' power to enact and enforce substantive protections outside of the scope of the RLA. Respondent did not include *Colorado Anti-Discrimination* in his argument, perhaps recognizing that that case, which involved a claimant who was not covered by RLA adjustment board procedures, provides no insight on issues of RLA preemption. It may be, too, that respondent recognizes *Colorado Anti-Discrimination* to raise issues more closely akin to accommodation of federal statutes, given the special and supportive relationship of federal and state enforcement of laws protecting civil rights. 42 U.S.C. § 2000e-5(c) through (f). In any event, a state's power to issue cease-and-desist orders against offending carriers, as occurred in *Colorado Anti-Discrimination*, is not necessarily implicated by a rule requiring employees to submit minor disputes to the federally-mandated RLA arbitration procedures.

[7] *See, e.g., Independent Metal Workers (Hughes Tool Co.)*, 147 NLRB 1573 (1964) (prohibiting bargaining to obtain illegal contract provisions discriminating among employees on invidious bases, such as race, sex, or national origin).

[8] *See, e.g., United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987) (recognizing public policy grounds for judicial rejection of arbitral awards).

nized that arbitral fora can and do provide meaningful and full protection of workers' public policy rights. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)[9]; *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974). That Congress itself has channelled RLA disputes into the arbitral forum counsels for even greater faith in that remedial scheme. Thus, the scope of preemption urged by petitioners preserves both the language and legislative intent underlying the RLA while at the same time avoiding infringement of the states' legitimate police power interests.

II. RETALIATORY DISCHARGE CLAIMS PRESENT ARBITRABLE MINOR DISPUTES

The issue as to which *certiorari* was granted in this case is "[w]hether the Hawaii Supreme Court erred in concluding that respondent's state law wrongful discharge claims were not preempted by the Railway Labor Act, 45 U.S.C. § 151 *et seq.*" *Hawaiian Airlines, Inc. v. Norris*, No. 92-2058 (January 21, 1994). For the reasons discussed above, that question turns on whether respondent's wrongful discharge claims constitute a "minor dispute" under the RLA. In our opening brief (Pet. Br. 8-36), we showed that the plain language of the RLA, its legislative history and underlying purposes, and its interpretation by this Court all establish that respondent's claims constitute a minor dispute subject to RLA arbitration. Respondent's brief (Resp. Br. 15-40) attempts, but ultimately fails, to support a contrary position using those same sources.

---

[9] The Solicitor General (Br. 26-27 n.24) attempts to distinguish *Gilmer* on the ground that the claim therein was governed by the Federal Arbitration Act ("FAA"), which specifically excludes transportation industry employees from its scope. However, it is clear that Congress excluded those workers from the FAA exactly because their disputes are already subject to arbitration through separate legislation. *See Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers*, 207 F.2d 450, 452 (3d Cir. 1953).

A. Statutory Language

This Court has repeatedly held that the plain meaning of a statute's language controls its interpertation.[10] The statutory language at issue in this case defines the category of minor disputes as "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 204. Our basic contention is that by including disputes "growing out of grievances" in addition to disputes over interpretation or application, the RLA encompasses more than just disputes invoking some contractual right, and certainly encompasses non-contractual retaliatory discharge claims such as the one asserted here. *See* Pet. Br. 9-11.

Respondent advances a contrary interpretation, based on two arguments. First, respondent argues (Resp. Br. 17-18) that the term "grievances" does not include workplace discipline and discharge cases unless the "grievance" itself requires interpretation or application of the collective agreement. Such a construction reads the phrase "growing out of grievances" out of the statute. Second, respondent contends that the word "or," as used in the statute, cannot be understood in the traditional sense that the word is used, *i.e.*, as presenting alternatives, either one of which could satisfy a given condition. Thus, respondent contends that although the statute encompasses disputes "growing out of grievances *or* out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," it really only includes the latter category, with the former category being meaningless.[11]

---

[10] *E.g., Negonsott v. Samuels*, 113 S. Ct. 1119, 1122-23 (1993); *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992); *United States v. Ron Pair Enter. Inc.*, 489 U.S. 235, 241 (1989).

[11] This Court long ago held that "the construction of a statute is preferred which gives all the words in it an operative meaning." *Early v. Doe*, 57 U.S. (16 How.) 610 (1853). Respondent is wrong to suggest (at 20) that our reading of the term "griev-

Respondent's construction flies in the face of this Court's recognition that "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." *E.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (use of the phrase "business or property" in § 4 of the Clayton Act indicated that "property" means something other than "business").[12] Respondent speculates (Resp. Br. 21-22) that in enacting the phrase "growing out of grievances" as a separate category of disputes from those involving interpretation or application, Congress "could well have" intended to encompass implied as well as express agreements, or "might equally have been concerned" that individual as well as collective disputes be included. Even apart from the existence of legislative history refuting this contention, see below at 12-14, respondent's hypotheses as to what Congress might have intended are insufficient to overcome the presumption that in using the term "or" to apply to disputes "growing out of grievances," Congress meant to include disputes other than just those growing "out of the interpretation or application of agreements."[13]

---

ances" would render the interpretation/application category "mere surplusage." Because disputes over interpretation or application of agreements may be submitted to arbitration by *employers* as well as employees, 45 U.S.C. § 184, there are clearly interpretation/application disputes that are *not* "grievances." It is respondent's position, not ours, that attempts to read words out of the statute.

[12] *See also Brook Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993); *Garcia v. United States*, 469 U.S. 70, 73 (1984); *FCC v. Pacifica Foundation*, 438 U.S. 726, 739-740 (1978).

[13] The appositional usage of "or" cited by the Solicitor General (Br. 15 n.13) is not consistent with the language of 45 U.S.C. § 204 because the phrase "*out of*" is repeated before both the word "grievances" and the words "interpretation or application of agreements." The grammar is clearly distinguishable from the appositional example—"fell over a precipice or cliff"—relied upon by the Solicitor General (Br. 15 n.13) based upon the third meaning of "or" from a 1986 dictionary. The phrase "fell over a precipice or

Moreover, respondent is flatly wrong in arguing that the word "grievances" as used in the RLA's "General Purposes" and "Adjustment Board" sections (45 U.S.C. §§ 151a(5), 153 First (i), and 204) encompasses in the labor relations setting only contractual grievances. One respected commentator writing contemporaneously with the adoption of the RLA in 1926 expressed the clear understanding that the term "grievances" was understood within the railroad industry to include disputes beyond the scope of the bargaining agreement:

> Railroad labor disputes may be divided roughly into two classes: first, major disputes, those arising out of proposed changes in existing rates of wages, hours or working conditions; second, minor disputes, those arising out of the application or interpretation of the provisions of an award or an agreement with respect to wages, hours or working conditions. *Personal grievances are also ordinarily included in the category of "minor disputes."*

H. Wolf, *The Railroad Labor Board* 50 (1927) (emphasis added). Furthermore, the term "grievances," read in context applying normal rules of grammar and statutory construction, includes non-contractual claims by employees.[14] Finally, discipline and discharge cases as a

---

over a cliff" would be analogous to Section 204's language, and that phrase conveys a purely disjunctive meaning, in which the word "fell" applies to the two separate categories, just as Section 204's language extends *both* to disputes growing *out of* grievances *and also* to disputes growing *out of* interpretation or application of agreements. None of the cases cited by respondent (at 19) and the Solicitor General (at 15) in which this Court has interpreted "or" in its appositional sense involved the repetition of a verb-preposition phrase as Congress did in Section 204.

[14] For instance, the National Labor Relations Board has on numerous occasions used the term in its broadest sense; indeed, there is a category of unfair labor practices involving an employer's non-contractual solicitation of "grievances" that the NLRB has identified as violating NLRA Section 8(a)(1), 29 U.S.C. § 158(a)(1). *See, e.g., Montgomery Ward & Co., Inc. v. NLRB*, 904 F.2d 1156, 1157 (7th Cir. 1990); *NLRB v. Aquatech, Inc.*, 926 F.2d 538, 544 (6th Cir. 1991).

class were considered to be within the category of "grievances" prior to the time that air carriers came to be encompassed within the Act. *E.g.*, Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 586 (1937) ("[q]uestions of discipline or refusal to promote (constituting 'grievances') are reviewable by the Board"); Pet. Br. 12-14.[15]

In Section 204, Congress further made it clear that adjustment board jurisdiction extended to non-contract-based discharge claims by transferring to adjustment boards "cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board." 45 U.S.C. § 184. Contrary to respondent's suggestion (Resp. Br. 22-23), Congress did not purport to limit the cases transferred from the NLRB to RLA adjustment boards solely to contract-based claims. To the contrary, Congress was well aware from testimony prior to enactment of Section 204 that public policy discharge claims would be among the types of claims expected to be transferred to RLA dispute resolution processes. *See* Pet. Br. at 12, 18. By contrast, there is absolutely nothing in the legislative history to support respondent's view that only contract-based claims were transferred.[16]

---

[15] Respondent also argues that the CBA at issue in this case itself employs a limited definition of "grievance." This assertion has no bearing on this dispute, for it is Congress's construction of the term in the context of Section 204 which is at issue. Even if the parties' intent were at issue, the RLA language and legislative history would be the appropriate starting place for the discussion, since the CBA in Art. XVII.P specifically provides that the CBA cannot be construed in any way to limit the rights of employees, their unions, or the company under the RLA. (Pet. App. 58a.) Moreover, even if the parties to the CBA sought to exclude a class of covered grievances from RLA-mandated procedures, it would be precluded from doing so. *Capraro v. United Parcel Serv. Co.*, 993 F.2d 328, 336-337 (3d Cir. 1993).

[16] Thus, for instance, the NLRB's annual reports from the same period do not indicate that any attempt was made by the NLRB to limit the types of airline cases transferred to RLA dispute resolution bodies. *See First Annual Report of the National Labor Relations Board* (1936) at 29, 30, 35, 36, 39, 41, 43; *Second Annual Report of the National Labor Relations Board* (1937) at 15, 20, 21, 24, 25, 26, 28. Nor would it be expected that the NLRB would retain any airline cases in light of the specific exclusion of RLA employers from NLRA coverage since that Act's inception. *See* NLRA Section 2(2), contained in 2 NLRB, Legislative History of the National Labor Relations Act of 1935, at 3271 (1935).

In addition, Congress has expressly referred railroad employees' "whistleblower" claims to RLA arbitration. 45 U.S.C. § 441(c); *see* Pet. Br. 12-14. The Solicitor General *concedes* (at 13 n.11) that railroad employees' state-law whistleblower claims "may be preempted" by this statutory provision, but argues that Congress would not have found it necessary to refer such claims to arbitration had it thought they were already there. That argument completely ignores legislative history demonstrating that Congress in fact had the opposite understanding: that employees "already receive[d] similar protection . . . through the grievance procedure" existing at the time, and the addition of statutory language was not meant "to alter the existing protection, but rather to put the prohibition of discrimination into statutory form." H.R. Rep. No. 1025, 96th Cong., 2d Sess. 8 (1980). Because airline employees are subject to the "existing protection" provided by the RLA, their whistleblower claims are also subject to RLA grievance procedures, and, thus, under the Solicitor General's logic as well as our own, their state law claims are preempted.

Respondent, but not the Solicitor General, argues (Resp. Br. 30) that the FRSA's "election of remedies" provision, 45 U.S.C. § 441(d), allows employees to pursue state-law whistleblower actions. This argument is easily dispensed with. As the Fourth Circuit held in *Rayner v. Smirl*, 873 F.2d 60, 66 n.1 (4th Cir.), *cert. denied*, 493 U.S. 876 (1989), a case cited with approval by the Solicitor General (at 13 n.11), section 441(d) does not provide an employee with an election of remedies to pursue state-law wrongful discharge claims pursuant to "the common law remedies of the fifty states," but rather was intended to preserve existing *federal* remedies.

Indeed, Congress made clear that "the protections provided [in the Act] would be enforced *solely* through the existing grievance procedures provided for in Section 3 of the Railway Labor Act," and that it "intend[ed] this to be the *exclusive* means for enforcing this section." H.R. Rep. No. 1025, 96th Cong., 2d Sess. 8, 16 (emphasis added), *reprinted in* 1980 U.S.C.C.A.N. 3830, 3832, 3841.[17]

B. Legislative History

In our opening brief (at 15-19), we showed that the RLA's legislative history, from the time of its enactment through its subsequent revisions, supports our position that disputes over discharge and discipline, even if non-contractual in origin, are "grievances" within the scope of the Act. Thus, for instance, key legislators at the time the RLA was passed expressed the understanding that the category now known as minor disputes included "grievances" and "*also* . . . disputes arising out of the interpretation and application of existing agreements," 67 Cong. Rec. 8807 (1926) (statement of Sen. Watson) (emphasis supplied), and "disagreements over grievances, interpretations, discipline, and other technicalities that arise from time to time in the workshop and out on the tracks in the operation of the roads." 67 Cong. Rec. 4517 (1926) (statement of Rep. Barkley).

Respondent cites (Resp. Br. 25-26) three portions of the RLA's legislative history to claim that the quoted legislators defined the category of minor disputes in narrower terms as encompassing only disputes over interpretation or application of agreements. In each case, however, the topic at hand was not the general scope of the minor dis-

[17] Whereas respondent insinuates (Resp. Br. 16) that the RLA adjustment procedures are inadequate to adjudicate claims of the type presented here, Congress has taken exactly the opposite view in expressly retaining employee whistleblower claims within the RLA structure pursuant to the FRSA. It should also be noted that this Court has ignored claimed inadequacies of the grievance procedure when considering the preemptive power of the RLA. *See* Petitioners Br. 29 n.19. *See also Andrews*, 406 U.S. at 330, 335-336 (Douglas, J. dissenting).

pute category, but rather the distinction between minor disputes and major disputes, which involve "disputes over the formation of collective agreements or efforts to secure changes in them." *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945). Thus, a portion of the quotation from Representative Barkley (Resp. Br. 25), omitted in ellipses from respondent's brief, makes clear that the quoted passage refers to a contrast between the role of adjustment boards in resolving minor disputes and a role *not* given to such boards—dealing with "changes of wages, their increases or decreases or change in working conditions or hours of service." Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 93d Cong., 2d Sess., Legislative History of the Railway Labor Act, As Amended (1926 through 1966) 192 (Comm. Print 1974) [hereinafter cited as "RLA Leg. Hist."].

Likewise, the sentence immediately prior to the second quotation from Representative Barkley (Resp. Br. 26), also omitted from respondent's brief, makes clear that he was drawing a distinction between the adjustment boards' power to interpret or apply agreements and the fact that "[t]he adjustment boards were not given the power to consider changes in working conditions." RLA Leg. Hist. 205. Finally, respondent's quotation from Senator Watson (Resp. Br. 26), omits in ellipses remarks making clear that he too was contrasting the adjustment boards' power to settle disputes over the interpretation and application of agreements "though they do not deal with the larger and more drastic and the more dangerous problem of *changes in the rates of pay or in the conditions of service or in the hours of work*." RLA Leg. Hist. 480 (emphasis added).[18]

It should not be surprising that legislators might have used narrower language concerning interpretation/applica-

[18] Although respondent also attempts to divine significance in quotations from Donald Richberg (at 24-25 & n.20), a private citizen testifying before a different Congress about a bill that did not pass, those quotations also appear to have been made in the context of distinguishing major from minor disputes.

tion of agreements in distinguishing minor disputes from major disputes. As we showed in our opening brief in discussing the *Conrail* case (at 26-27), and as respondent nowhere rebuts, the distinction between major and minor disputes is fundamentally about the character of a dispute vis-a-vis an agreement: whether a dispute involves a change in an agreement subject to NMB mediation procedures (major dispute), or involves interpretation of an agreement subject to RLA arbitration (minor dispute). This dividing line does not call into play the type of individual discipline and discharge grievances at issue here, which are clearly *not* major disputes.

As to subsequent amendments to the RLA, respondent cites (Resp. Br. 28) a statement from a House Report in connection with the 1934 amendments as equating "grievances" with contractual disputes. That same Report noted, however, that "[t]he bill does not introduce any new principles into the existing Railway Labor Act," H.R. Rep. No. 1944, 73d Cong., 2d Sess. 2, 6 (1934), and we have shown that neither the statutory language nor Congress's intent was so limited. Respondent also relies upon a House Report on the 1936 amendments excusing a delay in the formation of airline adjustment boards on the ground that they would have "nothing to do" pending formation of agreements in the airline industry, but respondent omits the very next passage of that Report, which states that "*temporary boards might be created . . . to settle individual disputes*" during this interim contract-formation period. H.R. Rep. No. 2243, 74th Cong., 2d Sess. 1 (1936).

C. Supreme Court Decisions

In *Burley*, this Court established that minor disputes "relate[] either to the meaning or proper application of a particular provision *or* to an omitted case" in which "the claim is founded upon some incident of the employment relation, or asserted one, *independent of those covered by the collective agreement*." 325 U.S. at 723 (emphasis added). Whereas respondent claims that the *Burley* Court

reached this question in *dicta*, a fair reading of that case establishes otherwise. The issue in *Burley* was whether the union or the individual employee had the final say in settling minor disputes. The Court found it "difficult to believe" that Congress intended to "submerge wholly the individual . . . interests" not only with regard to "forming the contracts which govern their employment relation, but also in giving effect to them *and to all other incidents of that relation*." 325 U.S. at 733-34 (footnote omitted) (emphasis added). As the Court explained, submerging the employee's interest to that of the union could have "drastic effects" in cases "where the grievance arises from *incidents of the employment relation not covered by a collective agreement*, in which presumably the collective interest would be affected only remotely, if at all . . . ." *Id.* at 736. Thus, while the employee claims addressed in *Burley* were contractual in nature, the existence of RLA arbitral jurisdiction over non-contractual grievances played an important part in the Court's holding in that case.[19]

Nor can respondent cast off the weight of *Burley* by arguing that the omitted case described therein applies only to "implied" contract terms. That argument is flatly inconsistent with the *Burley* Court's identification of a personal injury claim as an example of an omitted case. Moreover, the central premise of *Burley* is that there is a class of disputes within RLA jurisdiction as to which "the collective interest would be affected only remotely," 325

---

[19] Respondent also argues that *Burley*'s omitted case discussion "was based on the understanding that the grievance-arbitration procedures provided for in the RLA are optional" pursuant to this Court's since-overruled *Moore* decision, and that the quoted language has thus gone the way of *Moore* itself. But *Burley*'s explanation of the scope of the minor dispute category was in no way dependent on *Moore*, and in any event, this Court in *Conrail* expressly recognized and quoted *Burley*'s "omitted case" discussion long after *Moore* had been overruled. 491 U.S. at 303. *Conrail*'s use of the above-quoted language from *Burley* is also fatal to respondent's argument (at 35-36 n.25) that this Court somehow undermined this language by failing to repeat it in its opinion on rehearing in *Burley*.

U.S. at 736, and implied contract terms implicate the collective interest in just the same way as express provisions. *See, e.g., Conrail*, 491 U.S. 299 (1989) (suit over "implied" contract term prosecuted by labor organization).

Finally, this Court's recent decision in *Buell* accords with *Burley*'s expansive reading of the minor dispute category. In *Buell* this Court could have avoided the question of whether the RLA impliedly repealed FELA remedies by simply adopting the Ninth Circuit's finding that the employee's personal injury claim was not a minor dispute within RLA adjustment board jurisdiction. *See Buell v. Atchison, Topeka and Santa Fe Ry.*, 771 F.2d 1320, 1323 (9th Cir. 1985) (dispute was not an arbitrable minor dispute because "it is neither related to the collective bargaining process nor arguably governed by its provisions"). Instead the Court expressly assumed that an RLA adjustment board would have jurisdiction over *Buell*'s non-contract-based personal injury claim, and cited prior cases involving ordinary personal injury claims—also apparently unrelated to the terms of any bargaining agreement—for the proposition that practices causing personal injuries "might have been cured or avoided by the timely invocation of the grievance machinery." 480 U.S. at 564 & n.11.

Andrews establishes that wrongful termination claims which constitute "minor disputes" must be resolved through RLA arbitration even if the claimant might enjoy better procedures and remedies if allowed to pursue a claim arising from the discharge under state law. 406 U.S. at 325; *see* Pet. Br. 28-30. Based on the Court's observation in *Andrews* that the source of the employee's claim was the collective bargaining agreement, respondent argues that *Andrews* held affirmatively that *only* contract-based claims are minor disputes under the Act. If *Andrews* had so held, it would have amounted to an overruling of *Burley*, and there is no evidence that the Court intended such a result. Moreover, since *Burley's* omitted case discussion was cited with approval in *Conrail*, see note 19 *supra*, respondent's attempt to convert observations concerning a characteristic of the claim in *Andrews* into an unwarranted legal limitation on the scope of minor disputes is wholly unavailing.[20] Indeed, respondent's position is inconsistent with the strongly-expressed policy in *Andrews* and its progeny that artful pleading and forum shopping should not be allowed to undermine the integrity of the RLA's mandatory processes. *See* Pet. Br. 38-39 (citing cases).

III. RESPONDENT'S READING OF *LINGLE* IS TOO NARROW

We showed in our opening brief (Pet. Br. 39-43) that the Hawaii Supreme Court erred in analogizing preemption under the RLA to the LMRA Section 301 preemption rule applied in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). This is so, in the first instance, because the RLA minor dispute category includes non-contractual grievances in addition to disputes over the interpretation or application of agreements, while Section 301 relates only to "suits for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185(a). Respondent's argument that the standard applied in *Lingle* is apt (Resp. Br. 40-48) stems from a contrary understanding of the scope of the RLA's minor dispute provisions, and thus falls along with its premise.[21]

---

[20] *Andrews* also disposes of respondent's suggestion (Resp. Br. 33) that the Seventh Amendment requires recognition of a jury trial right here. The Dissenting Justice's Seventh Amendment protestations, *see* 406 U.S. at 329 (Douglas, J., dissenting), were not even addressed by the *Andrews* Court. Numerous other decisions of this Court hold state common law claims, and any allied right to a jury trial, preempted by federal statutes. *E.g., Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620-21 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S. Ct. 478, 481, 483 (1990); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 315, 327 (1981).

[21] For other differences between the RLA and LMRA that counsel against importation of the *Lingle* rule into the RLA context, see Pet. Br. 39-43.

Even if an attempt were made to import the rule in *Lingle* into the RLA context—*i.e.*, even if the line were drawn so that only interpretation/application disputes would be deemed minor disputes—the narrow interpretation of *Lingle* advanced by respondent would still be flatly inconsistent with the RLA. Respondent first argues under *Lingle* (Resp. Br. 48-50) that contractual defenses asserted by an employer do not count for purposes of analyzing whether a claim is preempted. That argument is clearly wrong under this Court's decision in *Conrail,* however, which held that the existence of even an "arguabl[e]" contractual defense is sufficient to create a minor dispute. 491 U.S. at 307.[22]

Second, respondent argues that it does not matter whether resolution of the claim requires "*some* reference to a labor agreement," but rather only whether reference to an agreement is implicated in the formal legal elements of the claim asserted, here said to be "a purely factual issue of motive." Resp. Br. 48-49 (emphasis in original). Putting aside the fact that questions of motive do involve contract interpretation,[23] respondent's proffered legal rule in effect asserts that courts may interpret labor agreements in the course of deciding state-law tort claims so long as

---

[22] Respondent's citation (Resp. Br. 50 n.30) to *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), is inapposite. *Caterpillar* merely held that a state law claim may not be removed from state court to federal court based on anticipated federal defenses. It did not address whether those defenses preempt state law claims.

[23] In resolving motive issues in discharge cases, courts routinely examine contractual provisions. *See, e.g., Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1018 (11th Cir. 1982) (employer may rebut plaintiff's prima facie case of unlawful discrimination by showing that less favorable treatment of employee was in accordance with union contract). Because the plaintiff in such a case bears the ultimate burden of persuasion regarding the employer's motive for discharge, *see NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the plaintiff must address contract interpretation issues to rebut the defendant's proffered motive.

the need to interpret the agreement does not arise from the formal legal elements of the claim being asserted. That is not how the lower courts have interpreted *Lingle*,[24] but even if the case were otherwise, such a rule clearly could not obtain under the RLA, where adjustment boards are given *exclusive* jurisdiction to interpret rail and airline labor agreements. *E.g., Pennsylvania R.R. v. Day,* 360 U.S. 548, 553 (1959).

These errors in respondent's analysis are important because, as we showed in our opening brief (at 43-45), adjudication of respondent's wrongful discharge claims in state court *would* involve issues of interpretation of the labor agreement, including a determination of whether respondent was in fact "discharged," [25] whether there was "just cause" to discharge respondent as the agreement re-

---

[24] *See, e.g., Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 530 (10th Cir. 1992) ("[a]n analysis of whether T.G. & Y. acted properly or not will inevitably require an analysis of what the CBA permitted"); *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531, 537 (4th Cir. 1991), *cert. denied,* 112 S. Ct. 912 (1992). We do not mean to suggest that *Lingle* has been a bright line test which has been consistently and uniformly applied by the lower courts; it clearly has not. *See, e.g., Beard v. Carrollton R.R.*, 893 F.2d 117, 122 & n.1 (6th Cir. 1989) (contrasting Kentucky's law of wrongful interference with contract, which makes breach of contract an essential element of the claim, with Ohio's doctrine, which does not, and holding that a state-law claim would be preempted under Kentucky law but not Ohio law); *Magerer v. John Sexton & Co.*, 912 F.2d 525, 529 (1st Cir. 1990).

[25] Respondent (Resp. Br. 49-50) and the Solicitor General (Br. 12-14) assert that whether Norris was "discharged" may be determined solely by looking at state law and ignoring the collective bargaining agreement and practices thereunder. This analytical approach eviscerates RLA grievance procedures, which provide for orderly review and adjustment of discipline. Because respondent's own invocation of the grievance machinery resulted in the termination being converted to a suspension, Norris should not now be able to ignore the more favorable result he obtained from the company through the grievance process. *Cf. Union Pacific R.R. v. Price*, 360 U.S. 601 (1959) (employee may not file state court claims seeking redetermination of matters previously adjudicated in RLA grievance proceeding he himself had initiated).

quires, whether Article IV.D(a) of the CBA justified discipline of Norris for refusing to sign work records, and whether Article XVII.F of the CBA, which protects employees from discipline for refusal to work in violation of state or federal safety laws, applies to respondent's dispute. Accordingly, even if the RLA standard for preemption required that the dispute involve interpretation or application of an agreement, respondent's wrongful discharge claims would be preempted under such a standard.

In our opening brief and in the preceding sections, petitioners offer a solution to the RLA preemption debate which gives full weight to all relevant statutory language, proper context to the RLA's history and purpose, and due deference to each of the prior rulings of this Court. In contrast, respondent's approach writes substantive provisions out of RLA Sections 151a(5), 153 First (i), and 204; requires an abandonment of traditional statutory construction rules; encourages forum shopping and inconsistent results; undermines the RLA's scheme for resolution of workplace disputes; and requires a reversal of *Burley's* explicit holding, cited with approval in *Conrail*, that non-contractual disputes fall within the scope of RLA adjustment board jurisdiction.[26]

---

[26] Contrary to respondent's assertion (Resp. Br. 31-32 and n.22), there are many examples of adjustment boards taking into account statutory protections and public policies in resolving RLA minor disputes. *See* Public Law Board No. 1483, Award No. 15 (November 7, 1975) (construing agreement in light of Hours of Service Law); NRAB Third Division Award No. 14113 (January 25, 1966) (deciding grievance by reference to California law imposing limit on weight women could be ordered to lift); NRAB Third Division Award No. 12970 (October 14, 1964) (deciding grievance by reference to municipal licensing rules); NRAB Third Division Award No. 4975 (July 31, 1950) (agreement construed in light of Hours of Service Law); NRAB First Division Award No. 11224 (February 24, 1947) (construing case law regarding continuity in service rules). Copies of these awards have been lodged with the Clerk of this Court. To the extent other boards have erroneously felt themselves constrained to avoid such matters, this Court is in a position to correct them with the decision herein.

Respectfuly submitted,

KENNETH B. HIPP *
DAVID J. DEZZANI
MARGARET C. JENKINS
LISA VON DER MEHDEN
GOODSILL ANDERSON QUINN & STIFEL
1099 Alakea Street
1800 Alii Place
Honolulu, Hawaii 96813
(808) 547-5600
Counsel for Petitioners
* Counsel of Record